

Internal Revenue Service

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Department of the Treasury

Washington, DC 20224

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Person To Contact:

, ID No.

Telephone Number:

Refer Reply To:

CC:ITA:B02

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Date:

October 21, 2009

TY:

Legend:

Taxpayer-Husband=

Taxpayer-Wife=

Taxpayers=

Date1=

Year1=

Preparer

CPA=

State=

\$a=

\$b=

\$c=

\$d=

Dear :

This is in response to the letter dated , submitted on your behalf by your authorized representative. In the letter you request an extension of time to make an election under § 163(d)(4)(B) of the Internal Revenue Code to include qualified dividend income as investment income for Year1. The request to make the late election is based on §§ 301.9100-1 and 301.9100-3 of the Procedure and Administration Regulations.

FACTS

The taxpayers timely filed a joint Year1 income tax return, pursuant to an extension request, on Date1. The income tax return was prepared by Preparer, who had been licensed in State for approximately years. The taxpayers had employed Preparer

for at least years and were comfortable with Preparer's reputation and competence.

Upon receipt of the Year1 tax return on Date1, the taxpayers questioned Preparer on several topics including substantial capital losses and investment interest expense. Preparer advised the taxpayers that since the tax return was due that day, it was best to file the tax return as prepared and address any subsequent changes on an amended tax return. The taxpayers were not advised at that time that an election to treat qualified dividends as investment income was available. The taxpayers have always hired tax preparers and never prepared their own income tax returns.

For Year1, the taxpayers reported total available investment interest expense of \$a. This amount consisted of investment interest incurred in Year1 of \$b, plus a carry forward from of \$c. The taxpayers also had qualified dividend income of \$d for Year1.

Subsequent to filing the Year1 income tax return, the taxpayers hired CPA to review their previous three years' tax returns. After review, CPA advised the taxpayers of the details of an election under § 163(d)(4)(B), and that the election had not been made on their tax return for any year through Year1. The taxpayers then requested if CPA could amend the Year1 tax return to make the election. CPA advised the taxpayers that it would require a ruling request from the Internal Revenue Service.

APPLICABLE LAW

Section 163(d)(1) provides that in the case of a taxpayer other than a corporation, the amount allowed as a deduction for investment interest for any taxable year shall not exceed the net investment income of the taxpayer for the taxable year.

Section 163(d)(4)(B) provides, in part, that investment income means the sum of --

(i) gross income from property held for investment (other than any gain taken into account under clause (ii)(I)),

(ii) the excess (if any) of --

(I) the net gain attributable to the disposition of property held for investment, over

(II) the net capital gain determined solely by taking into account gains and losses from dispositions of property held for investment, plus

(iii) so much of the net capital gain referred to in clause (ii)(II) (or, if lesser, the net gain referred to in clause (ii)(I)) as the taxpayer elects to take into account under this clause. Such term shall include qualified dividend income (as defined in section 1(h)(11)(B)) only to the extent the taxpayer elects to treat such income as investment income for

purposes of this subsection.

Section 1.163(d)-1(b) of the Income Tax Regulations provides that the election for qualified dividend income must be made on or before the due date (including extensions) of the income tax return for the taxable year in which the qualified dividend income is received.

Section 1.163(d)-1(c) provides that the election under § 163(d)(4)(B) is revocable with the consent of the Commissioner.

Sections 301.9100-1 through 301.9100-3 of the Procedure and Administration Regulations provide the standards the Commissioner uses to determine whether to grant an extension of time to make a regulatory election. Section 301.9100-2 provides automatic extensions of time for making certain elections. Section 301.9100-3 provides extensions of time for making elections that do not meet the requirements of § 301.9100-2.

Section 301.9100-1(b) defines the term "regulatory election" as an election whose due date is prescribed by a regulation published in the Federal Register, or a revenue ruling, revenue procedure, notice or announcement published in the Internal Revenue Bulletin.

Section 301.9100-1(c) provides that the Commissioner may grant a reasonable extension of time to make a regulatory election, or a statutory election (but no more than six months except in the case of a taxpayer who is abroad), under all subtitles of the Internal Revenue Code except subtitles E, G, H, and I.

Section 301.9100-3(a) provides that requests for extensions of time for regulatory elections (other than automatic changes covered under § 301.9100-2) will be granted when the taxpayer provides evidence to establish to the satisfaction of the Commissioner that the taxpayer acted reasonably and in good faith, and that granting relief will not prejudice the interests of the Government.

Section 301.9100-3(b)(1) provides that a taxpayer will be deemed to have acted reasonably and in good faith if the taxpayer --

(i) requests relief before the failure to make the regulatory election is discovered by the Service;

(ii) inadvertently failed to make the election because of intervening events beyond the taxpayer's control;

(iii) failed to make the election because, after exercising due diligence, the taxpayer was unaware of the necessity for the election;

(iv) reasonably relied on the written advice of the Service; or

(v) reasonably relied on a qualified tax professional, and the tax professional failed to make, or advise the taxpayer to make the election.

Section 301.9100-3(b)(3) provides that a taxpayer will not be considered to have acted reasonably and in good faith if the taxpayer --

(i) seeks to alter a return position for which an accuracy-related penalty could be imposed under § 6662 at the time the taxpayer requests relief and the new position requires a regulatory election for which relief is requested;

(ii) was informed in all material respects of the required election and related tax consequences, but chose not to file the election; or

(iii) uses hindsight in requesting relief. If specific facts have changed since the original deadline that make the election advantageous to a taxpayer, the Service will not ordinarily grant relief.

Section 301.9100-3(c)(1) provides that the Commissioner will grant a reasonable extension of time only when the interests of the Government will not be prejudiced by the granting of relief. Under paragraph (c)(1)(i), the interests of the government are prejudiced if granting relief would result in a taxpayer having a lower tax liability in the aggregate for all taxable years affected by the election than the taxpayer would have had if the election had been timely made. Under paragraph (c)(1)(ii), the interests of the Government are ordinarily prejudiced if the taxable year in which the regulatory election should have been made is closed by the period of limitations on assessment under § 6501(a) before the taxpayer's receipt of a ruling granting relief under this section.

CONCLUSION

The taxpayers' election is a regulatory election, as defined under § 301.9100-1(b), because the due date of the election is prescribed in the regulations under § 1.163(d)-1(b). In the present situation, the requirements of §§ 301.9100-1 and 301.9100-3 of the regulations have been satisfied. The information and representations made by the taxpayers establish that the taxpayers acted reasonably and in good faith with this request. The affidavits presented show that the taxpayers reasonably relied on a tax professional for the filing of their return, however, the tax professional failed to make, or advise the taxpayers to make the election. The affidavits presented show that the taxpayers were unaware of the necessity for the election and upon discovery of the error promptly requested relief.

The taxpayers are not seeking to alter a return position for which an accuracy-related penalty has been or could be imposed under § 6662 at the time relief is requested. The taxpayers were not informed in all material respects of the required election, and its related tax consequences. Furthermore, the taxpayers are not using hindsight in

requesting relief. The taxpayers have represented that specific facts have not changed since the original deadline that make the election advantageous to the taxpayers. Moreover, the taxable years in which the regulatory elections should have been made and any taxable years that would have been affected by the elections had they been timely made, are not closed by the period of assessment.

Finally, granting an extension will not prejudice the interests of the Government. It is represented that the taxpayers will not have a lower tax liability in the aggregate for all taxable years affected by the election if given permission to make the election in the appropriate amount at this time than the taxpayers would have if the election were made in the appropriate amount by the original deadline for making the election. Accordingly, the taxpayers are granted an extension of time for making the election until 60 days following the date of this ruling.

The rulings contained in this letter are based upon information and representations submitted by the taxpayer and accompanied by a penalty of perjury statement executed by an appropriate party. While this office has not verified any of the material submitted in support of the request for rulings, it is subject to verification on examination.

Except as expressly provided herein, no opinion is expressed or implied concerning the tax consequences of any aspect of any transaction or item discussed or referenced in this letter.

This ruling is directed only to the taxpayer requesting it. Section 6110(k)(3) provides that it may not be used or cited as precedent.

In accordance with the Power of Attorney on file with this office, a copy of this letter is being sent to your authorized representative.

A copy of this letter must be attached to any income tax return to which it is relevant. Alternatively, taxpayers filing their returns electronically may satisfy this requirement by attaching a statement to their return that provides the date and control number of the letter ruling.

Sincerely,

Thomas D. Moffitt

THOMAS D. MOFFITT
Chief, Branch 2
(Income Tax & Accounting)

cc: